Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

GORDON THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in holding that the police had probable cause to seize and search a package observed in the petitioner's car in a situation where the officer was inexperienced, no crime had been committed, and where the shape of the package was the driving force in the probable cause analysis?

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Gordon Thornton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 18, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 197 F.3d 241 and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court denying the Petitioner's Motion to Suppress is unreported and is reprinted at App. 36a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment in this case on November 18, 1999, App. 1a. The jurisdiction of the District Court was based on 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves an interpretation of the Fourth Amendment to the United States Constitution, which is set forth at App. 40a.

STATEMENT OF THE CASE

In the early afternoon of February 17, 1997, the petitioner and a passenger were allegedly parked three to four feet from the curb in a no-parking zone. App. at 3a.[1] The petitioner's vehicle was supposedly parked in a "high-crime" area of the

1. In the City of Chicago, a parking violation is a civil violation and not a crime. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1349-1350 (7th Cir.), *cert. denied*, 520 U.S. 1241 (1997).

City of Chicago. App. at 3a. The vehicle had valid Indiana license plates. After getting out of their vehicle, two officers approached the vehicle on foot. App. at 3a. The officers claimed that the petitioner got out of his vehicle, carrying a hand-held device. App. at 3a.[2] According to the officers, the device was broadcasting police radio communications. App. at 3a.[3]

As the petitioner stood near the open driver's door of the vehicle, he was patted down for weapons. App. at 3a. One officer testified that during the pat-down, he noticed a package on the rear floor of the car. App. at 3a.[4] That package was wrapped in tan tape. App. at 3a. The officer estimated that the package was 2 inches thick, 4 inches wide, and 8 inches long. App. at 3a-4a.

The officer who had observed the package testified that he had received training on drug packaging while at the police academy some eight years before the petitioner was stopped. Significantly, the officer admitted that he had never before been involved in a drug investigation or arrest which involved a kilogram of cocaine or more.

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2. The statement in the text is the version offered by the police. The petitioner testified that he did not get out of the car until he was ordered to do so by the police. App. at 4a.

3. At the time, the police thought that the device was a police scanner. App. at 3a. It was later determined that the device was a walkie-talkie. App. at 3a. The petitioner denied that he was monitoring police radio transmissions.

4. The petitioner denied that there was a package visible in his vehicle. App. at 3a. The Seventh Circuit credited the police's version because that version had been accepted by the district judge. App. at 5a-6a.

Although the petitioner had not been arrested and although the police did not have a warrant, the officer allegedly reached inside of the vehicle and pulled back a piece of the tape. App. at 4a. The officer did this because he suspected that the opaque container was a package of cocaine. App. at 4a. When the officer pulled back the tape, he discovered that the package contained a white powdery substance. App. at 4a.[5]

The petitioner and his passenger were arrested and handcuffed. App. at 4a. The vehicle was then searched. App. at 4a. Eventually, the police discovered two loaded semi-automatic pistols and 13 additional kilograms of cocaine in two hidden compartments. App. at 4a.

The petitioner moved to suppress all of the cocaine and weapons discovered during the search. The district judge denied that motion, reasoning that a warrant was not required if the police had probable cause to believe that the vehicle contained contraband, citing *California v. Acevedo*, 500 U.S. 565 (1991). App. at 36a-39a.

The petitioner thereafter pleaded guilty to a drug conspiracy, while reserving his right to appeal the denial of the suppression motion. The petitioner was thereafter sentenced to 300 months in custody. App. at 26a-35a.

The Seventh Circuit affirmed the district judge's decision to deny the suppression motion. App. at 1a; *United States v. Thornton*, 197 F.3d 241 (7th Cir. 1999).

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5. Tests performed later verified that the substance was cocaine. App. at 4a.

The court's reasoning had the following components:

1. The plain view doctrine allows the warrantless seizure of evidence if the officer was lawfully in a place from which the evidence could be seen. App. at 8a;

2. The discovery of the evidence must be inadvertent[6], and the incriminating nature of the property must be immediately apparent. App. at 8a;

3. The police officer had the right to approach the petitioner. App. at 8a;

4. The petitioner got out of the vehicle first.[7] App at. 8a;

5. The package was in plain view once the petitioner opened the door. App. at 8a;

6. All that is required is a practical, nontechnical probability that incriminating evidence is involved, citing *Texas v. Brown*, 460 U.S. 730 (1983) and *California v. Acevedo*, 500 U.S. 565 (1991). App. at 8a-9a; and

7. Given all of the circumstances of the stop, including the fact that the petitioner appeared to be monitoring police radio communications, the officer had probable cause to reach inside the vehicle and to open the package without a warrant. App. at 9a.

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6. The "inadvertent" requirement first appeared in a dictum in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). This Court rejected the "inadvertent" prong of the test in *Horton v. California*, 496 U.S. 128 (1990).

7. Although this was a contested evidentiary point, the Seventh Circuit had accepted the police's version as the factual basis for the analysis. App. at 5a-6a.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS THE CONVERGENCE OF THREE SEPARATE THEMES WHICH HAVE CAUSED THIS COURT AND LOWER COURTS A GREAT DEAL OF DIFFICULTY: THE AUTOMOBILE EXCEPTION AS IT RELATES TO CLOSED CONTAINERS, THE PLAIN VIEW DOCTRINE AS IT RELATES TO OPAQUE CONTAINERS, AND HOW THE EXPERIENCE LEVEL OF THE POLICE OFFICER SHOULD AFFECT THE PROBABLE CAUSE ANALYSIS. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY FURTHER THE PARAMETERS OF ACCEPTABLE AND UNACCEPTABLE CONDUCT IN THIS VERY DIFFICULT AND CONFUSING AREA OF THE LAW.

A. Introduction

In the instant case, an officer who had never participated in an investigation involving the seizure of a kilogram of cocaine justified the warrantless seizure of a package from the petitioner's car on the grounds that the opaque package appeared to him to be the type of package which would contain cocaine.

The package was arguably the only substantial basis for probable cause.[8] It was not until the package was seized and opened that the officer had probable cause to search the vehicle.

8. The Seventh Circuit relied on the fact that a civil traffic infraction had been committed in a high crime area of Chicago and that the petitioner had emerged from the vehicle holding a device which the officer believed was transmitting police communications. As discussed, *infra*, the petitioner's argument is that these factors do not amount to probable cause and that the Seventh Circuit erred when it concluded that those factors plus the officer's impressions about the package were sufficient to justify the warrantless seizure and search of the package.

While this Court has considered the issue of when the shape of a package will warrant its seizure, this Court has yet to clearly define the considerations which the lower courts and law enforcement agents should use in determining whether the shape of a package justifies its warrantless seizure.

The petitioner is asking this Court to grant the writ so that this important issue can be addressed. *See* Supreme Court Rule 10(c).

The existing precedent in this area combines several different lines of authority. One such line of authority deals with the right of the police to seize and search closed containers which are located in automobiles. A second line of authority deals with the plain view doctrine, particularly as it relates to opaque packages. A final issue relates to the experience level of the officer and the degree to which that experience should affect the outcome of the analysis.

The next sections of the petition will summarize each of these lines of authority. The final section of the petition will address the specific facts of this case and the reasoning used by the Seventh Circuit Court of Appeals to deny relief.

B. Closed Containers in Automobiles

As this Court stated in *California v. Acevedo*, 500 U.S. 565, 568 (1991), the law applicable to closed containers in automobiles is "a subject which has troubled courts and law enforcement officers since it was first considered in *Chadwick*."

In *Acevedo*, the police in Hawaii intercepted a Federal Express package that contained marijuana. The package was addressed to a J.R. Daza at an address in Santa Ana, California. Law enforcement officers waited at the Federal Express station in California and followed the man who picked up the package to an apartment.

The man who had identified himself as Daza and who had picked up the package was observed throwing the outer package and packaging materials into the trash. The apartment was watched while an effort was made to obtain a search warrant.

While the officers were waiting, they observed a man later identified as St. George arrive at the apartment and leave with a knapsack which seemed to be at least partially full. St. George was stopped, and marijuana was discovered in the knapsack.

Shortly after St. George was arrested, the petitioner, Acevedo, arrived at Daza's apartment. After about ten minutes, Acevedo left the apartment carrying a paper bag which was about the same size as the bags which had been observed in the Federal Express package. Acevedo put the bag in the trunk of his car and started to leave the area. Officers stopped Acevedo. The trunk of Acevedo's vehicle was opened as was the paper bag. The marijuana which was discovered inside of the bag was the basis of a state prosecution.

The issue before this Court was whether the Fourth Amendment precluded the warrantless seizure and search of the paper bag. This Court concluded that the Fourth Amendment was not violated. In reaching that conclusion, this Court traced the often tangled history of the closed container cases.

A watershed case in this historical analysis was *United States v. Ross*, 456 U.S. 798 (1982). In *Ross*, this Court held that if there was probable cause to support the search of the vehicle, the police could also search any container which was found within that vehicle, even if that container was closed and even if the police had no idea as to what might be inside the container.

Acevedo represented an opportunity for this Court to address two divergent lines of authority. One line of authority was represented by *Carroll v. United States*, 267 U.S. 132 (1925) and *Ross*. The second line of authority was represented by *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979).

In *Chadwick*, the police believed that a 200 pound foot locker contained narcotics. The police watched as the foot locker was carried from the train to an automobile. As soon as the locker was placed in the automobile, agents arrested the defendants, seized the locker, and searched it. The Government did not invoke the automobile exception. Rather, the Government argued that moveable luggage should be considered as being analogous to a moving automobile. This Court disagreed and held that because a person has an expectation of privacy in luggage, the warrantless search of that luggage violated the Fourth Amendment.

In *Sanders*, this Court extended *Chadwick*'s reasoning to a suitcase which was being transported in the trunk of an automobile. The *Sanders* Court reasoned that the suitcase was luggage even though it was being transported in a moving automobile. This Court relied on *Chadwick* rather than on the automobile exception set forth in *Carroll*.

Having reviewed this history, this Court concluded that the distinctions made by these divergent lines of authority were confusing to both courts and law enforcement agents.

This Court then elected to follow the *Ross* line of authority when it came to automobiles. Under *Ross*, this Court concluded that there was probable cause to believe that the paper bag contained contraband. Accordingly, this Court ruled that the seizure and search of the paper bag was within the parameters of the Fourth Amendment. This Court was careful to note that the police only had probable cause to search the one container and not the entire vehicle. Probable cause is still required before a warrantless search of this type will be approved.

Acevedo has received a great deal of attention from the lower courts. A computer check indicated that *Acevedo* was cited in 198 cases in the state courts, 151 cases in the United States Courts of Appeals, and in 73 cases in the United States District Courts.

This Court revisited the closed container issue last term in *Wyoming v. Houghton*, 527 U.S. 295 (1999). In *Houghton*, the police made a routine traffic stop. The officer noted that the driver had a hypodermic syringe in his pocket. When confronted, the driver admitted that he used the syringe to take drugs. Also seated in the front seat were Houghton and another female passenger. The officer ordered everyone out of the car and searched the passenger compartment for contraband. The officer found a purse on the back seat. Houghton claimed that the purse was hers. The officer began searching the purse. Identification located within the purse indicated to the officer for the first time that Houghton had given a false name. A further search of the purse led to the

discovery of a pouch. Inside of the pouch, the officer discovered a syringe containing drugs. The officer also discovered a wallet-type container which contained a small amount of drugs.

This Court ruled that there is no distinction to be drawn among packages or containers based upon ownership. If the police have the probable cause to search containers, they can search all of the containers which are located within the vehicle.

As discussed, *infra*, the thrust of all of these cases is that the police must have probable cause to believe that the vehicle and/or a container within the vehicle contains contraband. Thus, *Ross*, *Acevedo*, and *Houghton* are all premised on the determination that the particular facts of each of those cases gave rise to probable cause. Said another way, if there was no probable cause to search either the vehicle or the containers within the vehicle, the outcome of those cases would likely have been different.

C. The Plain View Exception

1. General Principles

Two recent decisions by this Court illustrate the general principles of the plain view exception.

In *Arizona v. Hicks*, 480 U.S. 321 (1987), a police officer made a warrantless entry into an apartment. That entry was made with probable cause. After entering the apartment, the officer noticed stereo equipment, which appeared out of place given the general squalid nature of the apartment.

The officer suspected that the stereo equipment had been stolen, but the officer had no way of verifying his suspicions without the serial numbers on the equipment. The serial numbers were not visible. In order to obtain the numbers, the officer moved the equipment. The serial numbers were then visible. The officer checked the serial numbers and confirmed that the numbers belonged to stolen equipment.

This Court ruled that moving the stereos was a seizure and that the seizure was unconstitutional. The stereo equipment was unrelated to the reason why the officer had entered the apartment. While the officer suspected that the equipment was stolen, he could not verify that fact without moving the equipment. Accordingly, the incriminating nature of the evidence was not in plain view. Since the officer did not have either probable cause or a warrant to seize the equipment and since the seizure of the equipment did not fit within any other exception to the warrant requirement, this Court held that the evidence must be suppressed.

In *Horton v. California*, 496 U.S. 128 (1990), the police were investigating an armed robbery. A warrant was obtained for the suspect's home. The warrant only authorized the police to search for stolen property. The police did not discover any stolen property, but did discover weapons which had been used in the robbery in plain view. The police seized the weapons, and they were used against the defendant in the course of the subsequent prosecution. The officer involved admitted that, despite the limitations in the warrant, he was looking for any other evidence which might connect the suspect to the robbery.

The defendant argued that, because of the officer's subjective intent, the discovery of the weapons was not inadvertent and that, accordingly, the weapons should have been suppressed.

This Court disagreed. This Court held that the officer's subjective intent was not the proper measure. Rather, the issue was whether an objective analysis of the facts would support the officer's actions. This Court also held that "inadvertence" was not a required element of the plain view exception. Thus, the fact that the officer was looking for evidence over and beyond that authorized by the warrant does not cause a violation of the Fourth Amendment.

In sum, this Court held that the issue is whether the officer was lawfully on the premises being searched, whether the evidence was indeed in plain view, and whether the incriminating nature of the evidence was immediately apparent. Since the officer passed muster using these criteria, the seizure of the weapons was proper under the plain view exception.

Horton and *Hicks* have received a great deal of attention from the lower federal and state courts. A computer check indicated that *Horton* has been cited in almost 1,300 cases while *Hicks* has been cited in almost 1,000 cases. The sheer volume of activity with respect to these cases highlights their importance not only to law enforcement but also to the state and federal judiciaries.

D. Plain View and the Shape of the Container

If the police have probable cause to search the vehicle, the shape of the container is irrelevant. As this Court held in *Acevedo v. California*, 500 U.S. 565 (1991), all containers can be searched as long as there is probable cause to either search the vehicle or the particular container. However, this rule only applies if there is probable cause. If probable cause is absent, then *Acevedo* would not authorize a warrantless search.

As discussed, *infra*, the alleged probable cause in this case stemmed from the shape of the opaque package and the officer's suspicion that a package of that shape contained cocaine. The petitioner has argued that the officer's suspicions were too vague to amount to probable cause. If the petitioner is right, then the shape of the package did not give the officer probable cause to seize and search.

Accordingly, the petitioner believes that the cases dealing with the plain view doctrine and the shape of the container in the absence of the exception developed in *Acevedo* are germane to the analysis of the central issue in petitioner's case.

The "shape of the package" issue came before this Court in *Robbins v. California*, 453 U.S. 420 (1981). In *Robbins*, the police conducted a warrantless search of two packages, each resembling an oversized, extra-long cigar box with slightly rounded corners and edges and wrapped in green opaque plastic and sealed with a strip of opaque tape. On appeal to this Court, the State argued that the Fourth Amendment protected only containers commonly used to transport personal effects. This Court rejected the argument that a nature-of-the-container distinction was significant under the Fourth Amendment.

In *United States v. Ross*, 456 U.S. 798 (1982), this Court also held that there was no constitutional distinction between "worthy" and "unworthy" containers. This Court noted that if property is entitled to constitutional protection, it does not matter whether the container was a briefcase or a lunch box.

Despite these holdings, there remains some question about whether the nature of the container might influence the analysis. In footnote 13 of *Arkansas v. Sanders*, 442 U.S. 753 (1979), this Court stated:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view", thereby obviating the need for a warrant.

The language of this footnote was quoted in apparent approval by this Court in *Ross*. It was also quoted with approval by the *Robbins* plurality. Thus, the petitioner believes that there are scenarios where the shape of the container is important to the resolution of the Fourth Amendment inquiry.

Since *Sanders*, *Ross*, and *Robbins*, a number of courts have wrestled with this issue and have given some substance to the analysis.

One line of cases deals with the situation where the packaging was essentially transparent, allowing the police to ascertain the contents of the package without opening or otherwise disturbing the package. These transparency cases include situations where there was a lawful viewing of the contents of a container before a controlled delivery or where the contents of a container were viewed and the container was thereafter under continual police observation. These cases generally hold that a warrant is not necessary because the contents of the package were in plain view. *See, e.g., United States v. Ramos*, 960 F.2d 1065 (D.C. Cir. 1992); *Blair v. United States*, 665 F.2d 500 (4th Cir. 1981); *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *United States v. Corral*, 970 F.2d 719 (10th Cir. 1992).

There are also cases dealing with plain touch and plain smell which have authorized warrantless searches based upon the conclusion that a lawful touch created probable cause that contraband is in the container or where a strong odor lawfully smelled also gave the probable cause to seize and search. *See, e.g., United States v. Williams*, 822 F.2d 1174 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295 (4th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983). *See also* this Court's discussion of the plain touch exception in *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

The more difficult problem for the courts has been when the contents of a container cannot be discerned using plain view, plain touch, or plain smell.

In *Robbins*, this Court spoke in terms of being able to infer the contents of a package from its outward appearance. The plurality opinion in *Robbins* seems to suggest that if the character of the container "clearly announces" its contents, that container could be searched without a warrant.

However, it is unclear where the dividing line is between packages which suggest their contents by their outside appearance and packages which do not. Specifically, it is unclear as to the degree of certainty which the police must have about the linkage between the nature of the container and the suspected contents.

This Court looked at this issue again in *Texas v. Brown*, 460 U.S. 730 (1983). In *Brown*, a car was stopped at a routine driver's license checkpoint. An officer saw the driver drop a knotted, opaque party balloon onto the seat. The officer also observed several small plastic vials, quantities of a loose white powder, and an open bag of party balloons. Based on these collective observations, the officer seized the balloons and arrested the defendant. A chemist later determined that the seized balloons contained heroin. A four-Justice plurality opined that "near certainty" was not required to justify the seizure in this case. Rather, the issue was whether the officer had probable cause to believe that the balloon contained an illicit substance.

The petitioner believes that the *Brown* case does not resolve the issue, however, for at least the following reasons:

A. The petitioner in *Brown* only challenged the warrantless seizure of the balloon. Thus, this Court did not address the question of whether a warrantless search of the seized balloon would have passed constitutional muster;

B. There was other tangible evidence (vials and white powder) which the officer could rely on in addition to the officer's observations of the balloon;

C. The decision of this Court was only a plurality decision, and there was thus no majority consensus about what the parameters of the analysis should be.

In sum, this Court has recognized that the "shape of the container" has some legal significance, but this Court has not defined the parameters of the analysis for the benefit of law enforcement officers or the state or Federal judiciaries.

E. Experience of the Officer

This issue was addressed by this Court in *Robbins v. California*, 453 U.S. 420 (1981).[9] In *Robbins*, the police seized two opaque packages wrapped in plastic. The packages were opened, and marijuana was discovered. The California Court of Appeals held that "any experienced officer could have inferred from the appearance of the packages that they contained bricks of marijuana." 453 U.S. at 427.

This Court looked at the evidence which underlay that assertion. The officer had testified that he had been told about the previous transportation of blocks of marijuana and had been told about the way that this type of contraband is wrapped. However, the officer had never seen contraband packaged in this fashion. 453 U.S. at 428.

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9. Although the primary holding of *Robbins* has been undermined by this Court's subsequent decision in *California v. Acevedo*, 500 U.S. 565 (1991), the petitioner believes that the analysis regarding the experience of the officer remains intact for purposes of a situation like the petitioner's case where it is relevant to determine whether the officer was in fact able to identify the contents of the package by its outer appearance.

This Court concluded that this statement was too vague to support the proposition that a package such as that observed by the officer could only contain marijuana. 453 U.S. at 428.

The implication of *Robbins* is that the observations of an inexperienced officer are entitled to far less weight than the observations of an officer who has had direct experience with the packaging at issue.

F. Discussion

The petitioner believes that the Seventh Circuit erred when it concluded that the police officer had probable cause to seize and search the package. Specifically, the Court of Appeals relied upon the following factors in support of its probable cause analysis:

A. The officer saw a package which the officer believed was of the size and shape to contain a kilogram of cocaine. App. at 9a.

The petitioner believes that the court gave insufficient consideration to the officer's lack of experience[10]. The officer admitted that he had never been involved in an investigation and/or an arrest where a kilogram of cocaine was involved. The officer indicated that he had received some training at the academy some eight years ago, but there was no indication that the training reflected the way that cocaine traffickers were presently wrapping the drugs. There was no other evidence that supported the assertion that this was a common way to package cocaine.

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10. Indeed, the Seventh Circuit credited the officer's alleged experience. App. at 9a.

In sum, the petitioner believes that, as in *Robbins*, there was an insufficient evidentiary basis to conclude that the wrapped package sufficiently proclaimed its contents and that, as a result, the officer had probable cause to seize and search it.

B. The officer saw the petitioner with a device and believed that the petitioner was monitoring police radio traffic. App. at 9a.

There is nothing in the opinion or the record which indicates that it was illegal to monitor police radio traffic. The police officer did not observe the petitioner or his passenger do anything substantive about the information which they allegedly monitored. Accordingly, the petitioner believes that the police scanner, even in conjunction with the opaque container, was insufficient to elevate generalized suspicion to probable cause.

C. The Seventh Circuit referred to the facts and circumstances of the case. Although the court did not set forth which facts upon it was relying in this portion of the opinion, the only other facts were:

1. The petitioner's car had out-of-state license plates;

2. The petitioner's car was parked in a "high-crime" area of town; and

3. The petitioner was parked three or four feet from the curb.

The petitioner submits that none of these acts was illegal. These facts may cause the officer to be suspicious, but the petitioner believes that this suspicion was only a hunch as opposed to probable cause.

D. The Seventh Circuit cited *Texas v. Brown*, 460 U.S. 730 (1983) and *California v. Acevedo*, 500 U.S. 565 (1991) for the proposition that the analysis should be practical and nontechnical, based on all of the circumstances. App. at 9a.

The petitioner does not quarrel with the standard, but the petitioner believes that the Seventh Circuit overlooked the fact that in both of the cases it cited there was considerably more information in support of the police's probable cause analysis. Thus, in *Brown*, the police officer observed tangible evidence other than the balloon which was directly related to drug-trafficking. Specifically, the officer observed a white powdery substance, vials, and a package of balloons. All of these additional facts bolstered the officer's belief that the balloons were used as packaging materials for drugs and that the defendant had those materials at hand for the purpose of active drug trafficking.

Similarly, in *Acevedo*, the police had intercepted a package and knew that the package contained contraband. The police had followed a suspect who had picked up the package to an apartment. The police had intercepted a visitor to the apartment who had marijuana in his possession after leaving the apartment. The police had observed the defendant go into the apartment, stay for 10 minutes, and leave with a paper bag which was the approximate size of the packaging which the police had observed when they examined the intercepted package. All of these reasons bolstered the probable cause determination and did not make that determination dependent on the package alone.

By contrast, in the instant case, the police had observed no crime. The police had observed no paraphernalia or other indicia of active drug trafficking. The police had some

grounds for generalized suspicions, but no more. There was insufficient evidence that the officer had sufficient training or background to be able to recognize instantly an opaque package as a package containing a kilogram of cocaine.

For all of these reasons, the petitioner submits that this would be an appropriate case to grant certiorari so that this Court can address an issue which it has not definitively resolved relating to when an opaque package can so proclaim its contents that a warrantless search of that package is justified.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the Court should address and decide the important question presented.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED NOVEMBER 18, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 98-2302, 98-3209, 98-3210 & 98-3235

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GORDON THORNTON, GARRICK JACKSON, KIRK REYNOLDS, and MICHAEL HARRIS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. IP 97-CR-0063-02, 03, 10, 11-M/F —
Larry J. McKinney, *Judge.*

ARGUED SEPTEMBER 9, 1999 — DECIDED NOVEMBER 18, 1999

Before COFFEY, KANNE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Major federal drug cases these days follow a fairly familiar pattern. They are centered in big cities, and they usually involve a wide-ranging drug distribution network that has been operating for several years.

Appendix A

The drug of choice is invariably cocaine, often in its most addictive form as crack. When charges are filed in these cases the first count always alleges the existence of a conspiracy to possess cocaine with intent to distribute. The typical case has a dozen or more defendants (many with multiple and often creative nicknames), and other counts in the indictment specifically charge some of them with individual acts of possession of cocaine with intent to distribute at various times and places. Often, additional charges against selected defendants are lodged alleging various weapons violations — carrying a firearm during a drug trafficking crime is a staple — or acts of money laundering.

When these cases arrive in court they follow a predictable pattern. Some of the defendants jump ship, make deals with the government, and become principal witnesses against those defendants who do not elect "to cooperate." "Cooperating" defendants usually do not receive a complete pass; instead they are permitted to wrap up their cases on more favorable terms based on their acceptance of responsibility under the federal sentencing guidelines and a motion for a downward departure based on the assistance given to the government. Other defendants, without cooperation agreements, nevertheless see the handwriting on the wall and plead guilty in an attempt to lessen their penalties. The few defendants left standing after all this activity go to trial before juries, and most are convicted on the major conspiracy count and many of the satellite counts as well. The jury verdicts or the guilty pleas are usually followed by long sentences under the guidelines. Then comes the inevitable appeal. The appeals in these cases raise issues that we see time and time again. The usual issues concern

things like perceived flaws in the jury instructions — a convicted defendant, for example, will argue that the district judge erred in failing to give a requested "multiple conspiracy" instruction — and claims of error in the admission of evidence.

The facts in this case and the issues raised on appeal are typical of the usual federal drug conspiracy prosecution we have just described. The case involves a 20-count indictment against 14 defendants which grew out of a conspiracy to distribute cocaine in the cities of Indianapolis and Chicago. Today we consider the appeals of three defendants who went to trial and were convicted and one who pled guilty, conditionally, so he could raise on appeal the legality of a search that produced incriminating evidence against him. The search issue is the most interesting of the questions presented, and we take it up first.

Gordon Thornton and a passenger were parked, 3 to 4 feet from the curb, in a no parking zone in what police say is a "high-crime" area of Chicago in the early afternoon of February 17, 1997. Chicago police officers Dale Willingham and Larry Gade spotted the illegally parked vehicle and stopped. As the officers approached on foot Thornton got out of the car, carrying a hand-held device that was broadcasting police radio communications. At the time, Officer Willingham thought the device was a police scanner; it turned out to be a walkie-talkie. As Thornton stood near the open driver's side door of the car, Willingham patted down Thornton for weapons. During the patdown Willingham observed on the rear floor of the car a package wrapped in tan tape that was 2 inches thick, 4 inches wide,

and 8 inches long. Suspecting that the package was a kilogram of cocaine, Willingham pulled back a piece of tape and discovered that the package contained a white powdery substance that tests later verified was indeed cocaine. The officers arrested and handcuffed Thornton and the passenger, Terry Galmore. Officer Gade searched the interior of the car and found cell phones, pagers, a second walkie-talkie, and a bionic ear that enables a person wearing a headset to hear conversations as far as a block away. Willingham opened the trunk and found a briefcase lined with Styrofoam to hold in place a machine pistol. His suspicions by now thoroughly aroused, Willingham searched the interior of the Buick Regal more carefully and uncovered two hidden compartments that contained 2 loaded semi-automatic pistols and 13 additional 1-kilogram packages of cocaine.

Thornton's version of what took place is a bit different. He testified that he did not exit the car on his own but was ordered to get out by the officers, who moved in with their weapons drawn. He denied that there was a package on the rear floor of his car. He testified that the bionic ear was for listening to bird calls. And he testified that he knew the combination to the briefcase found in the trunk but did not own the briefcase and did not know who owned it.

Thornton says the district court should not have credited Willingham's testimony. Thornton says it would have been difficult for Willingham, while checking Thornton for weapons, to see past him through the open car door and spot the package on the rear floorboard. Thornton also emphasizes that the device Willingham originally testified was a police

scanner monitoring police radio communications actually was a walkie-talkie incapable of direct monitoring.

Credibility determinations based on the plausibility of competing accounts are factual findings that are overturned on appeal only if clearly erroneous. *United States v. Doe*, 149 F.3d 634, 639 (7th Cir.), *cert. denied*, 119 S. Ct. 260 (1998). In a swearing contest, the trial judge's choice of whom to believe will not be rejected unless the judge credited exceedingly improbable testimony. *United States v. Cardona-Rivera*, 904 F.2d 1149, 1152 (7th Cir. 1990). Thornton testified that there was no package on the rear floorboard and introduced a demonstrative videotape purporting to show that the rear floorboard would not have been visible to the police officer. Willingham testified that he saw a package on the rear floorboard, and the government introduced photographs purporting to indicate that the rear floorboard would have been visible. Willingham originally testified that he confiscated two scanners that were monitoring the same police radio traffic that the officers were receiving on their radios. When informed that the devices were mere walkie-talkies incapable of monitoring a police frequency, the officer suggested that the walkie-talkies may have been receiving transmissions from a third walkie-talkie in the area that was placed next to a scanner.

So we have a pure credibility clash, and although a police officer's badge is no absolute guarantee of honesty, an officer's testimony is never inherently less believable than the testimony of a defendant facing a long prison term. On the basis of this record we cannot say that the district court clearly erred in finding Officer Willingham more credible

than Thornton, whose testimony included such whoppers as claiming he did not know who owned the briefcase that just happened to be in his trunk and of which he mysteriously knew the combination and suggesting that the sophisticated listening equipment found in his car in a gritty Chicago neighborhood in mid-February was for birding. The district court did not credit exceedingly improbable testimony in believing that Willingham saw the package on the rear floorboard and in concluding that Thornton's walkie-talkies were indirectly monitoring police radio traffic.

Thornton argues that the evidence found in the car should have been suppressed because each step the police took violated his Fourth Amendment right to be secure against unreasonable searches and seizures. First, Thornton suggests that the police had no business approaching his car in the first place, because in Chicago a parking violation is a civil offense, not a crime. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1349-50 (7th Cir.), *cert. denied*, 520 U.S. 1241 (1997). To begin with, law enforcement officers may approach an individual on the street without any basis whatsoever. *Florida v. Royer*, 460 U.S. 491, 497 (1983); *United States v. Serna-Barreto*, 842 F.2d 965, 966 (7th Cir. 1988). Furthermore, the Supreme Court ruled unanimously in *Whren v. United States*, 517 U.S. 806, 810 (1996), that police officers could stop a car if the officers had probable cause to believe that a civil traffic regulation was violated. If the police may approach someone on a public street for no reason, and if police may pull over a vehicle if there is probable cause that a civil traffic violation has been committed, then Willingham and his partner surely did not violate the Fourth Amendment by walking up to Thornton,

who was sitting in a car that rested in a spot where it was violating one of Chicago's parking regulations.

Second, Thornton says the police did not have an articulable suspicion to conduct a *Terry* stop-and-frisk. *See Terry v. Ohio*, 392 U.S. 1 (1968). The whole picture must be taken into account in determining whether the police are justified in conducting a *Terry* stop, including the inferences and deductions made by a trained police officer. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Circumstances which appear innocent to the outside observer may suggest criminal activity to experienced law enforcement personnel who may assess these circumstances in light of their experience. *United States v. Dennis*, 115 F.3d 524, 533 (7th Cir. 1997). According to Willingham's account, which we are treating as credible, when the officers approached, Thornton got out of the car holding a device that was broadcasting police radio communications. The car was standing several feet from the curb in a no parking zone. In less than one year there had been some 2,500 drug arrests in the five-block-by-five-block area where the incident occurred. A high-crime area, standing alone, is insufficient to justify a search, but it is a factor that may be considered in the totality of the circumstances. *United States v. Quinn*, 83 F.3d 917, 921 n.2 (7th Cir. 1996). Whether an illegally parked car, a crime-ridden neighborhood, the driver's sudden exit, and the driver's possession of a device that was monitoring police radio traffic add up to sufficient suspicion to justify a *Terry* stop is a close call. It also is a call we need not make here. The evidence Thornton wants suppressed was not obtained because of the *Terry* stop-and-frisk.

Third, Thornton asserts the package was not in plain view. This is the crucial question. The plain view doctrine allows the warrantless seizure of evidence if a police officer was lawfully in the place from which he saw the evidence if the discovery of the evidence was inadvertent and if the incriminating nature of the property was immediately apparent to the officer. *United States v. Carmany*, 901 F.2d 76, 77 (7th Cir. 1990). We already have accepted that Willingham lawfully approached the vehicle, that Thornton opened the door and got out of the car, and that through the open door Willingham spotted the package on the rear floor of the car. Whether the *Terry* stop-and-frisk was justified doesn't matter because the *Terry* stop was not what prompted Thornton to open the car door. He got out of the car *first*. Even if Willingham did not have a right to frisk Thornton for weapons, he did have a right to be standing next to the car. Whether Willingham spotted the package while conducting a possibly unconstitutional stop-and-frisk or whether he spotted the package while simply standing outside the open car door next to Thornton is irrelevant. What matters is that the package was in plain view once Thornton opened the door.

Fourth, Thornton claims that the police did not have probable cause to open the package without a warrant. Based on what transpired on the street that afternoon and his training and experience, Willingham thought a package of that size wrapped in tape of that sort probably was a 1-kilogram brick of cocaine. "[A] wrapped brick of cocaine does not necessarily proclaim its contents so unequivocally as to justify a search without a warrant." *Cardona-Rivera*, 904 F.2d at 1154. But all that is required for such a

warrantless search is a practical, nontechnical probability that incriminating evidence is involved, based on all the circumstances. *Texas v. Brown*, 460 U.S. 730, 742 (1983). *See also California v. Acevedo*, 500 U.S. 565, 580 (1991); *Cardona-Rivera*, 904 F.2d at 1156; *Carmany*, 901 F.2d at 77-78. Like the *Terry* determination, this is a close call, but in light of Officer Willingham's experience and the circumstances surrounding this encounter, particularly the fact that Thornton appeared to be monitoring police radio traffic, the officer had probable cause to look into the package without a warrant.

Fifth, Thornton contends that the police did not have probable cause to search the entire vehicle without a warrant. This is the weakest of Thornton's claims, because once the cocaine was out of the wrapping the cat was out of the bag. Automobiles may be searched without a warrant if there is probable cause that the car contains evidence the officers are entitled to seize. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). The discovery of the 1-kilogram brick of cocaine created probable cause to search the rest of Thornton's car.

Consequently, the district court properly denied Thornton's motion to suppress, and Thornton's conviction is affirmed.

We turn now to the claims of the defendants who went to trial. Michael Harris, Garrick Jackson, and Kirk Reynolds all were found guilty of conspiracy to possess with intent to distribute and to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846 and of possession

with intent to distribute cocaine and/or cocaine base in violation of 21 U.S.C. § 841(a)(1). In addition, Harris was convicted of several firearms violations. Harris and Reynolds both received life sentences; Jackson was sentenced to 18 years in prison. Individually or collectively, the three defendants raise seven different claims.

First, Harris complains that he was entitled to a mistrial in the district court and deserves a new trial now because some of the testimony elicited by a government witness was untrue. We review a district court's denial of a mistrial motion for abuse of discretion because the trial judge is in the best position to determine whether an incident was sufficiently serious to warrant a mistrial. *United States v. Lomeli*, 76 F.3d 146, 150 (7th Cir. 1996).

Dewayne Thomas, the last coconspirator to testify, said that Harris joined in the conspiracy in early 1992. Harris' counsel requested a sidebar, reported that Harris had been sentenced to a 3-year state prison term in January 1992 (no evidence that Harris actually began serving the sentence at that time was entered into the record), and observed that he could not impeach the witness on this point without revealing his client's criminal record. The prosecutor attempted unsuccessfully to coax Thomas into clarifying that Harris was not involved in early 1992, but Thomas stuck to his story. The prosecutor moved on, and the remainder of Thomas' testimony on direct examination referred only to Harris' involvement in 1994 and 1995. On cross-examination defense counsel raised the issue, and Thomas again said Harris was involved as early as 1992. The prosecution did not repeat or try to use to its advantage Thomas' apparent misstatements.

Appendix A

Thomas' references on direct and cross examination to Harris being involved in the conspiracy in 1992 were brief and comprised a tiny fraction of his testimony, which goes on for 147 transcript pages. Likewise, Thomas' testimony constituted only a portion of the case against Harris. Numerous other coconspirators testified about Harris' extensive role in the drug scheme, including the orders he gave to underlings and his personal involvement in transporting, cooking, and distributing the drugs. Physical evidence included cocaine and guns seized by law enforcement officers from Harris' car and drug ledgers that document his involvement. A videotape played at the trial showed Harris delivering 2 ounces of crack to Jackson, who in turn sold the crack to an undercover police officer. In the face of this mountain of evidence the trial judge did not abuse his discretion in denying a mistrial because one witness got the date of Harris' involvement wrong.

Harris believes he is entitled to a new trial on appeal, however, because the government knowingly used false testimony. We order a new trial because the prosecution knowingly used false testimony only if (1) the prosecution's case included perjured testimony; (2) the prosecution knew or should have known of the perjury; and (3) there is any likelihood that the false testimony could have affected the judgment of the jury. *United States v. Payne*, 102 F.3d 289, 292 (7th Cir. 1996) (quoting *United States v. Adebayo*, 985 F.2d 1333, 1341 (7th Cir. 1993)). For these purposes, "perjured" testimony means "false" testimony. *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995). Even if Thomas' testimony was false, and even if the government should have known that Harris was imprisoned in early 1992, the

testimony was fleeting and insignificant and cannot have affected the judgment of the jury that heard and saw so much other damning evidence. The remote possibility that there was any problem regarding Thomas' errant testimony was cured by the judge's instruction[1] to limit the assessment of guilt or innocence to the conspiracy charged, which did not cover 1992.

Second, Harris challenges the admission of 51 documents as lacking authentication and violating the rule against hearsay. The trial court's evidentiary rulings, including decisions on hearsay, are reviewed for abuse of discretion. *United States v. Johnson*, 127 F.3d 625, 630 (7th Cir. 1997). Federal Rule of Evidence 901 requires a prima facie showing of genuineness, leaving it to the jury to decide the true authenticity and probative value of evidence. *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997). The one exhibit that police did not seize — an envelope that said "Don's Guns" and that was identical to an envelope that had contained money used to purchase 15 semiautomatic weapons at another gun store — was authenticated by the gun dealer who received the original envelope and by the law enforcement agent to whom the gun dealer provided the envelope. The other 50 documents at issue were seized by

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1. The judge instructed the jury as follows: "You have heard evidence of certain other acts of the defendants other than those charged in the Indictment. The defendants are not on trial for any act or conduct not alleged in the Indictment. Therefore, you may consider evidence of acts and conduct not alleged in the Indictment only for limited purposes, including motive, intent, opportunity, preparation, plan, knowledge, absence of mistake or accident, and identity."

law enforcement personnel from the person, residence, or vehicle of a coconspirator. Law enforcement officers testified about the seizure of the items and several coconspirators testified about the documents with which they were familiar. Many of the documents, such as utility bills, merchandise receipts, and business cards, were sufficiently distinctive to qualify as self-authenticating under Rule 901(b)(4). Harris' claim that authentication was lacking because the actual authors of the documents did not testify is wrong. The CEO of Indianapolis Power and Light need not be called to authenticate one of the utility's bills. The location of the documents and their substance, along with additional testimony in some instances, provided an adequate foundation for their admission.

Harris' hearsay argument is no more compelling. Most of the documents are tools of the drug trade that constitute statements made by coconspirators during the course and in furtherance of the conspiracy and thus are not hearsay under Federal Rule of Evidence 801(d)(2)(E). *See United States v. Nava-Salazar*, 30 F.3d 788, 798 (7th Cir. 1994); *United States v. De Gudino*, 722 F.2d 1351, 1356 (7th Cir. 1983). The remainder of the documents show the relationship of the coconspirators to each other or to an item seized and thus were not introduced for the truth of the matter asserted. *See United States v. Guyton*, 36 F.3d 655, 658 (7th Cir. 1994).

Third, Harris, Jackson, and Reynolds all fault the trial court for allowing into evidence the government's proffer letters to cooperating witnesses and for not allowing cross-examination of these witnesses to delve into polygraph testing. The admission of proffer letters is an evidentiary

decision reviewed for abuse of discretion. *United States v. Lewis*, 110 F.3d 417, 422 (7th Cir.), *cert. denied*, 118 S. Ct. 149 (1997). Limitations on cross-examination that directly implicate the Sixth Amendment right to confrontation are reviewed *de novo*. However, merely confining the scope of cross-examination, which is what took place here, is a discretionary decision by the trial court that is reviewed for abuse of discretion. *United States v. Meyer*, 157 F.3d 1067, 1080-81 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1465 (1999); *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir. 1995).

The government introduced into evidence plea agreements for the nine cooperating witnesses, as well as proffer letters for most of those witnesses. Each of the proffer letters makes three references[2] to truthfulness and each of the plea agreements makes five references[3] to truthfulness.

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2. The three references to truthful testimony in the proffer letters pertained to the following topics: (1) providing "false" information could result in prosecution for perjury or giving a false statement; (2) the grant of use immunity is conditioned on the indictee's "complete and candid compliance" with the terms of the agreement and any violation could result in prosecution for perjury, false statements, or obstruction of justice; (3) after the indictee provides the proffer the government "will assess the value of the information provided, your honesty, candor and special circumstances."

3. The five references to truthful testimony in the plea agreements pertained to the following topics: (1) the codefendant agreed to provide "complete, total and truthful debriefings" regarding criminal activity to the government; (2) the codefendant agreed to provide "complete, total and truthful" testimony before grand juries

(Cont'd)

Just as defense counsel have every right to attack the credibility of witnesses who get deals, the prosecution is entitled to get into evidence the fact that the deals are conditioned upon truthful testimony. "[O]n direct examination, the prosecutor may elicit testimony regarding the witness' plea agreement and actually introduce the plea agreement into evidence." *Lewis*, 110 F.3d at 421 (internal quotations and citations omitted). Contrary to the defendants' claims, the admission of these agreements does not constitute government vouching for the credibility of the witnesses. Two types of "vouching" are forbidden: a prosecutor may not express her personal belief in the truthfulness of a witness, and a prosecutor may not imply that facts not before the jury lend a witness credibility. *United States v. Renteria*, 106 F.3d 765, 767 (7th Cir. 1997). Neither sin was committed here. The proffer letters and plea agreements merely laid out the terms and conditions of the agreements. *See Lewis*, 110 F.3d at 421. Each side could urge competing inferences — as indeed the defendants' did — but the jury's role as independent fact finder was not undermined. *Renteria*, 106 F.3d at 767.

(Cont'd)

and at trials; (3) the government agreed not to bring criminal charges against the codefendant for the "full, complete and truthful information and testimony" the codefendant provided; (4) the government reserved the right to prosecute for perjury or false statements if the codefendant testified "falsely"; (5) breach of the agreement, such as the failure to provide "full, complete and truthful information and testimony," could result in the agreement being withdrawn.

Appendix A

The documents in this case closely track the language of the proffer letters and plea agreements that were allowed in *Lewis*, 110 F.3d at 421. Likewise, the judge's jury instructions here[4] resemble the judge's instructions in that case. *Lewis* said that the admission of proffer letters and plea agreements was not an attempt to enhance the credibility of the witnesses and that the judge's instructions should have dispelled any harmful effects. *Id.* at 421-22. The same logic applies here, and we reach the same result.

However, some words of wisdom to the wise: This decision should not be read as an enthusiastic endorsement for the admission of all proffer letters and all plea agreements at all times and in all places. We approve the admission in this case in light of the judge's jury instructions and in light of the overwhelming evidence that would render any erroneous admission harmless. But for more than a decade we have been warning prosecutors to "avoid unnecessarily repetitive references to truthfulness if it wishes to introduce the agreements into evidence." *Id.* at 42; *Renteria*, 106 F.3d

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4. The judge told the jury that "[y]ou are the sole judges of the credibility — that is, the believability — of the witnesses." The judge said the jury "should draw no inferences" based on the government's exercise of its discretion to enter into plea bargains and emphasized that "[y]ou may give this testimony such weight as you feel it deserves, keeping in mind that such testimony is always to be received with caution and weighed with great care." The judge noted that "[y]ou have heard testimony from witnesses who received immunity, that is a promise from the government that any testimony or other information he or she provided would not be used against him or her in a criminal case. You may give this testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care."

at 767 n.2; *United States v. Mealy*, 851 F.2d 890, 899 (7th Cir. 1988). Three references to truthfulness in the proffer letters and five references in the plea agreements comes perilously close to being unnecessarily repetitive. If these seemingly duplicative statements are essential to airtight immunity and plea agreements, prosecutors should consider refraining from introducing the documents into evidence and rely instead on testimony summarizing the agreement. If prosecutors want to introduce the actual documents into evidence they should ease up on multiple references to the necessity of complete and truthful testimony.

The admission of the proffer letters, in particular, strikes us as overkill. The plea agreements' references to truthfulness were repetitive enough — admitting the proffer letters, with their own repetitive references to truthfulness, compounded the problem. The government confidently states that "while the immunity letters and plea agreements contained similar language concerning truthfulness, they were executed at different times and fulfilled distinct purposes." But this does not explain what distinct evidentiary purpose the admission of the proffer letters served at trial. The plea agreements explained the conditions under which the cooperating codefendants were testifying. The proffer letters, which memorialize the framework under which the codefendants agreed to talk in the first place, seem of scant relevance at trial when a subsequent, superseding plea agreement has been reached. There may come a day in another case when we find excessive the admission of proffer letters containing repeated references to honesty. The government may wish to think twice before risking reversal for the presumably minimal benefit achieved by the admission of these documents.

Appendix A

At the defendants' request, the district judge redacted from all of the cooperating witnesses' plea agreements a sentence in which the witness consented to submit to a polygraph examination upon the government's request. (The government never made any requests and none of the cooperating witnesses ever took a polygraph test.) However, proffer letters to two witnesses, Renee Yvette Booker and Valarie Sanders, also mentioned the possibility of a polygraph test. While cross-examining Sanders, Reynolds' counsel exhibited to the jury the proffer letter containing the polygraph test reference. The judge cut off this line of cross-examination. Later, the judge decided to admit into evidence Booker's proffer letter without redacting the polygraph reference. Admitting the polygraph reference was a mistake. Unlike in *United States v. Bursten*, 560 F.2d 779, 785 (7th Cir. 1977), defense counsel were not permitted to cross-examine the witness on this subject. Unlike in *Lewis*, 110 F.3d at 421 n.2, defense counsel were not responsible for the admission of the polygraph reference as to Booker. However, the judge cured any problem by instructing the jury not to pay attention to whether Booker might have taken a polygraph test.[5] Furthermore, two passing references to the possibility of polygraph tests for two witnesses was harmless in a jury trial that lasted 19 days, involved

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5. The judge told the jury: "[O]ne of the things that you may have heard, or picked up somewhere, is that there are references now and again in these proffer agreements, and sometimes even in plea agreements, to lie detector tests. Now, you are not to draw any inference from that as to whether a particular individual either took or didn't take a lie detector test or passed or didn't pass a lie detector test. Everybody understand that? No speculation about that, no inferences to be drawn from that."

60 witnesses and contained strong evidence of the defendants' guilt.

On a related note, the defendants claim their Sixth Amendment right to confrontation was violated because the district judge prohibited them from bringing out in cross-examination the fact that none of the government's witnesses took lie detector tests. Since the polygraph test statement in Booker's proffer letter was admitted, defense counsel should have been permitted to cross-examine her on this subject. But, for the reasons just given, the failure to allow this line of questioning was harmless. As to the other witnesses, the district judge did not abuse his discretion in refusing to allow cross-examination regarding polygraph tests that never were taken and of which any reference was redacted.

Fourth, Jackson claims that evidence that he purchased and sold cocaine six times was insufficient to prove that he was part of the elaborate drug distribution conspiracy that was charged. Prevailing on a sufficiency of the evidence challenge is as unlikely as hearing the song of a warbler on a central Chicago street in February, with or without the aid of a bionic ear. We review the evidence in the light most favorable to the government, and we affirm the conviction if any rational fact finder could have found the essential elements of the crime were established beyond a reasonable doubt. *United States v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999).

Proving a conspiracy under 21 U.S.C. § 846 requires that (1) two or more people agreed to commit an unlawful

act and (2) the defendant knowingly and intentionally joined in that agreement. No overt act is required. *United States v. Shabani*, 513 U.S. 10 (1994); *United States v. Hickok*, 77 F.3d 992, 1004 n.11 (7th Cir. 1996). The government must present substantial evidence that the defendant knew of the illegal objective of the conspiracy and agreed to participate. *United States v. Theodosopoulos*, 48 F.3d 1438, 1450 (7th Cir. 1995). However, juries may view discrete transactions in their broader context. *Menting*, 166 F.3d at 928. "Evidence of frequent and repeated transactions, especially when credit arrangements are made, can support a conspiracy conviction. An ongoing relationship in which drugs are sold on credit suggests a level of cooperation and trust that is absent from the isolated and discrete transaction." *United States v. Fagan*, 35 F.3d 1203, 1206 (7th Cir. 1994) (citations omitted). An established method of payment, a standardized transaction, and a demonstrated level of mutual trust also are indicia of a conspiracy. *Id.*

Prior to each of Jackson's six sales of crack to an undercover officer, James T. Jones, Jackson told the officer that he had to contact "his people" to obtain the crack. In each case Jackson delivered the crack with weight tags that were unique to this drug organization. In each case Jackson received the crack before he paid for it (and before he obtained payment from the officer). In the final transaction, captured on videotape, Jackson received the crack from Harris, one of the head honchos in the drug organization, and then sold it to Jones. Afterward, Jackson told the officer he could provide much larger quantities of crack or cocaine powder. All of these factors point toward a level of cooperation and trust that would be absent if Jackson were

not connected to the larger drug network. One need not be at the heart of a conspiracy to be part of its web. Furthermore, Jackson worked at Keystone Auto Body in Indianapolis, where he used the telephone to arrange the drug sales. The auto shop was frequented by Harris, Carr, and other coconspirators, where crack occasionally was delivered and where cars used to deliver crack were repaired. A jury may consider evidence of the activities surrounding a defendant in determining the defendant's knowledge of the conspiracy. *United States v. Gonzalez*, 933 F.2d 417, 441 (7th Cir. 1991). There was sufficient evidence for a reasonable jury to find that Jackson was part of the conspiracy charged.

Fifth, Jackson contends that the trial court erred in refusing to instruct the jury that he was not guilty if he was part of a different conspiracy than the one charged. However, jury instructions that are given are reviewed as a whole to see if they treat an issue fairly and adequately. *United States v. Walker*, 25 F.3d 540, 546 (7th Cir. 1994). We will not overturn a conviction merely because the addition or subtraction of a few words might have improved a defendant's chance of acquittal, but only if the instructions so misguided the jury as to prejudice the defendant. *United States v. Smith*, 131 F.3d 685, 688 (7th Cir. 1997).

If the possibility of a multiple conspiracy exists, the district court must so instruct the jury. *Walker*, 25 F.3d at 546-47. Multiple conspiracies exist when there are separate agreements to effectuate distinct purposes. *Id.* at 547. "[T]he parties involved in a single conspiracy need not know one another or participate in every aspect of the conspiracy . . . . [A]s long as the evidence demonstrates that the coconspirators . . . knowingly embraced a common criminal

objective, this is sufficient to establish the existence of a single overall conspiracy among the coconspirators." *United States v. Magana*, 118 F.3d 1173, 1186 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1104 (1998) (quoting *United States v. Briscoe*, 896 F.2d 1476, 1507 (7th Cir. 1990)).

Jackson suggests that there were at least three conspiracies whirling away: the one charged, one involving Amelia Jamison, and one in which Jackson received cocaine from Regina Gilbert and Michael Harris. The evidence, however, does not suggest these were separate schemes with distinct purposes, but rather one agreement with one purpose — to distribute cocaine and crack. Reynolds provided the money, Carr provided the manpower, and Jackson was one of many distributors. A videotape played at the trial shows Jackson getting crack from Harris, one of the conspiracy's ringleaders. Jamison said the drug business was like a tree with several branches. Jackson wants to prune each of those branches into separate conspiracies, but that runs counter to the facts and counter to conspiracy law.

Even if the evidence warranted a multiple conspiracy instruction, the conviction will not be reversed unless the failure to give the instruction denied Jackson a fair trial. *United States v. Katalinich*, 113 F.3d 1475, 1482 (7th Cir.), *cert. denied*, 118 S. Ct. 260 (1997). Jackson did not get the precise instruction he wanted, but the trial court did instruct the jury that the government had to prove Jackson was part of the conspiracy charged.[6] Like the instructions endorsed

6. The judge told the jury that the government had to prove certain elements to convict Jackson of the conspiracy "as charged

(Cont'd)

in *Katalinich*, 113 F.3d at 1482-83, the instructions here were fair and adequate. Jackson has not shown he was prejudiced by the district court's refusal to give a specific multiple conspiracy instruction.

Sixth, Jackson argues that because only a fraction of the evidence at the trial pertained to him the district court should have granted his motion for severance. Like appeals based on the sufficiency of the evidence and the propriety of jury instructions, the defendant's yoke on a severance appeal is a heavy one that the facts in this case simply do not support. A district court's denial of a motion for severance is reviewed for abuse of discretion. *Zafiro v. United States*, 506 U.S. 534, 541 (1993). The defendant must show that without severance he was unable to obtain a fair trial, not merely that his chance of acquittal would have been higher at a separate trial. *United States v. Pulido*, 69 F.3d 192, 207 (7th Cir. 1995). "[W]hen defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539.

(Cont'd)

in Count 1 of the Indictment." The judge also told the jury that "in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only that defendant's acts and statements . . . . It is necessary, however, that the Government prove beyond a reasonable doubt that a defendant was aware of the common purpose, and was a willing participant, with the intent to advance the purpose of the conspiracy."

Appendix A

The classic situations where failure to sever may be prejudicial involve the admission of damaging evidence at a joint trial that would be inadmissible if the defendant were being tried alone or the exclusion at a joint trial of exculpatory evidence that would be available if the defendant were being tried solo. *Id.* Jackson fails to identify any such spillover evidence and fails to show how he was otherwise prejudiced by the evidence that was admitted. Instead, he picks up the recurring theme in his appeal that he was just a little guy who was unfairly thrown together with the heavyweight drug dealers tried in this case. Jackson ignores the jury instructions that emphasized that each defendant's guilt or innocence should be decided individually.[7] We presume that a jury "will capably sort through the evidence and will follow limiting instructions from the court to

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7. The judge told the jury: "Although these defendants are being tried together, you must separately consider the evidence against each defendant on each charge, and return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge. Your decision on any one defendant or one charge, whether it is guilty or not guilty, should not influence your decision on any other defendant or charge." The judge also told the jury: "You must give separate consideration both to each count and to each defendant. You must consider each count and the evidence relating to it separate and apart from every other count. Although the defendants are being tried jointly, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his or her case decided on the evidence and the law applicable to him or her."

consider each count separately." *United States v. Turner*, 93 F.3d 276, 284 (7th Cir. 1996). Jackson's bald assertion that a jury inevitably lumps everything and everybody together in a case like this is undercut by the jury's return of a not guilty verdict on one of the counts against Harris. *See, e.g., United States v. Cooper*, 942 F.2d 1200, 1205 (7th Cir. 1991). Jackson fails to show that trying him jointly with Harris and Reynolds was prejudicial. Also, a case can be made that the "I'm just a little fish compared to these other guys" defense theme carries some weight with juries, so trying everyone together is not automatically a bad deal for non-ringleaders.

Seventh, Jackson and Reynolds urge this court to adopt the dissent's position in *United States v. Singleton*, 165 F.3d 1297, 1308-15 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (1999), that 18 U.S.C. § 201(c)(2) forbids testimony from witnesses who were promised immunity from prosecution or lower sentences in exchange for their cooperation. This is the most desperate of the defendants' arguments. It also is an argument that has been soundly rejected by this circuit, as in most others. *United States v. Condon*, 170 F.3d 687 (7th Cir.), *cert. denied*, 119 S. Ct. 1784 (1999).

For these reasons, the judgments of conviction of Harris, Jackson and Reynolds — as well as of Thornton — are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA DATED MAY 21, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Case Number: 1:97CR00063-010

UNITED STATES OF AMERICA

v.

Gordon Thornton

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Adam Bourgeois
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1

* * *

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 841 (a)(1) & 846	Conspiracy to Possess with Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/03/1997	1

Appendix B

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
332-68-6833

05/18/1998
Date of Imposition of Judgment

Defendant's Date of Birth:
08/24/1971

Defendant's USM No.:
32167-048

s/ Larry J. McKinney
Signature of Judicial Officer

Defendant's Residence Address:
Bureau of Prisons
Indianapolis IN 46204

Honorable Larry J. McKinney
Judge, U. S. District Court
Name & Title of Judicial Officer

Defendant's Mailing Address:
Bureau of Prisons
Indianapolis IN 46204

5/21/98
Date

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 300 month(s).

☒ The court makes the following recommendations to the Bureau of Prisons:

Pekin, Illinois facility due to lung ailment.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix B

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision

Appendix B

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with

any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1.) The defendant shall provide the probation officer access to any requested financial information.

2.) The defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

3.) The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine
Totals:	$ 100.00	$ 2,000.00

* * *

FINE

* * *

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

Appendix B

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

Through the Bureau of Prisons' Inmate Financial Responsibility Program.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center

is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Presentence investigation waived by defendant and his counsel.

Guideline Range Determined by the Court:

Total Offense Level: 38

Criminal History Category: III

Imprisonment Range: 292 to 365 months

Supervised Release Range: 5 years

Fine Range: $ 25,000.00 to $ 4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

Appendix B

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Sentence imposed at this point per the plea agreement.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION ON DEFENDANT'S MOTION TO SUPPRESS DATED AND FILED APRIL 10, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 97-063-CR-10 M/F

UNITED STATES OF AMERICA,

Plaintiff,

V.

GORDON THORNTON,

Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This matter pends on defendant Thornton's Motion to Suppress. The vehicle in which defendant Thornton and an acquaintance were sitting was searched. Weapons and cocaine were found. Thornton has moved the Court to suppress that evidence. Thornton's vehicle was located between the no parking sign and a fire hydrant, three feet from the curb along a Chicago street. A police officer noticed the car, stopped and parked his vehicle. He and his partner

approached the Thornton vehicle in order to ascertain the reason for the vehicle's presence. As the officer approached, Thornton exited the vehicle from the driver's side door, leaving the driver's side door on the two-door vehicle open. During the ensuing conversation the police officer noticed a tan taped package approximately two by eight by four inches. On his approach to the vehicle, the officer heard a police band broadcasting from a walkie talkie located in the front seat of the vehicle.

The officer patted Thornton down. He then opened the tan package and found a substance that he believed to be cocaine. Assistance was then summoned and soon arrived. Additionally, the officers found a "bionic ear", a cell phone, and pagers in the front seat. The officer then opened the trunk and found an empty suitcase which he believed was designed to carry a machine pistol. The officer then suspicioned that weapons might be in the vehicle and searched it, discovering two hidden compartments containing weapons and additional drugs. The drugs were similarly packaged to the drugs observed in the back seat.

The vehicle was stopped close to a fire hydrant and it was stopped some three feet away from the curb in a clearly marked "no parking" zone. While defendants make an argument that Chicago ordinances make it lawful to "stop" in a "no parking" zone, this Court will not consider those nuances because the car was three feet from the curb and uncontestedly near a fire hydrant. The officers did an investigatory "stop" of the idle vehicle in which the defendant and another were seated. Under these facts this Court finds that the officers had reasonable suspicion that the occupants

of the car were violating a traffic law. Such a reasonable suspicion justified an inquiry under *Terry v. Ohio*, 392 U.S. 1 (1968).

Defendant has attempted to establish that it would have been impossible for the officer to have seen the package on the back seat floor board in the two door sedan model vehicle. The testimony is that the front seat was not as far back as it would go at the time of the arrest and this Court now finds that the package was in plain view behind the defendant as he stood beside the car with the driver's side door open.

Defendant has offered proof that there was no police scanner anywhere in the vehicle. Instead, there was a walkie-talkie incapable of monitoring any police broadcast. The walkie-talkie is capable of transmitting the sounds that are directed into its mouthpiece. A scanner broadcast placed next to another walkie-talkie at another location could have been transmitted to the walkie-talkie in the front seat of the car. This Court finds it reasonable to believe that a scanner was the ultimate source of the sound emanating from the walkie-talkie in the front seat of defendant's car. The police officer thought that the defendant had access to information being broadcast on police radios when he made his decision to search the vehicle.

In addition to the facts and observations outlined above, the officer was aware that he was in a high crime area, that is, an area in which there had been 2,500 drug related arrests within a year of this arrest. As defendant exited the vehicle the officer had the impression that the defendant was trying to lead him away from the car. All these circumstances

combine to give the officer reasonable cause to pat down the defendant in a search for weapons and to detain he and his companion.

The officer observed the uniquely wrapped package on the floor board of the back seat. His experience and training lead him to suspect that a package wrapped in tape and shaped like a brick would likely contain cocaine. He opened the package and observed a white powdery substance he thought was probably cocaine. It is at this point, after observing the defendant seated in his idle vehicle, in a "no parking" zone, three feet from the curb, a few feet from a fire hydrant, after he approached the car, watched the defendant get out of the car and appear to try to move away from the car, and having heard police broadcasts coming from inside the vehicle, seeing the brick shaped taped package, and visually verifying that the package contained a white powdery substance, all within a high drug crime area, that the officer had probable cause to search the vehicle. The search revealed the contraband. The trunk search led to the hidden compartments that contained the contraband which defendant now seeks to suppress.

A search does not require a warrant on the officer's probable cause to believe that the vehicle contains contraband. *California v. Acevedi*, 500 U.S. 565 (1983). For all the forgoing reasons, defendant Thornton's Motion to Suppress is **DENIED**.

APPENDIX D — CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * *